BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 57448-s40R BY SHERIDAN COUNTY/)
CITY OF PLENTYWOOD)

* * * * * * * *

A Proposal for Decision was entered in this matter on May 10, 1988. The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. Timely exceptions to the Proposal for Decision were filed by the Applicants on August 22, 1988, (Applicant's Exceptions) and the Objectors on July 25, 1988 (Objector's Exceptions). Oral arguments on the exceptions filed to the Proposal for Decision were held before the agency in Billings, Montana, on March 8, 1989.

The Department of Natural Resources and Conservation ("Department" or "DNRC") accepts and adopts the Findings of Fact and Conclusions of Law of the Hearing Examiner as contained in the May 10, 1988 Proposal for Decision, and incorporates them herein by reference.

EXCEPTIONS OF APPLICANTS

In their exceptions to the Proposal for Decision, the Applicant, City of Plentywood, admits that it did not have the requisite bona fide intent to appropriate water at the time the application was filed. Therefore, there is no dispute over whether City of Plentywood's portion for the Application for Beneficial Water Use Permit No. 57448-s40R was properly denied.

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Applicant Sheridan County asserts that the Proposal for Decision was correct in determining that Sheridan County did have the requisite bona fide intent to appropriate water for use primarily as a recreational facility. Sheridan County excepts to the proposal for Decision stating that it implies that Sheridan County's appropriation under this Application would be reduced to 2,800 acre-feet instead of the 3,500 acre-feet applied for because the Hearing Examiner removed the 700 acre-feet applied for by the City of Plentywood. Applicant's Exceptions, pp. 1-2. However, the Proposal for Decision does not imply that the Hearing Examiner reduced the planned capacity of the reservoir for recreational purposes from 3,500 acre-feet to 2,800 acre-feet. The Proposal for Decision specifically notes that the Hearing Examiner has considered the proposed recreation appropriation apart from the proposed municipal appropriation, and considers the application request for 3,500 acre-feet of water per annum for recreation.

The Applicant, County of Sheridan, has entered into a stipulation with the United States Fish and Wildlife Service whereby it has agreed to restrict its period of appropriation. Proposal for Decision, Finding of Fact No. 11. The Applicant agrees with the Findings of the Hearing Examiner that, based on the restrictions of the stipulation, in an average year, only 605 acre-feet of water will run off upper Plentywood Creek during the restricted period of appropriation from June 15 to February 15. Applicant's Exceptions, p. 4. Portions of this available 605

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acre-feet will be lost through reservoir evaporation and seepage. The Applicant agrees that evaporation losses will account for 54% of this average flow of 605 acre-feet. Therefore, the Applicant's contention is that seepage losses will not exceed the remaining 278 acre-feet per year and that there is enough water available for appropriation.

The Hearing Examiner ruled that there was no substantial credible evidence as to the amount of seepage lost.

> Because the record contains no evidence as to the amount of seepage loss, it can not be determined whether the bottom lands upstream from the proposed dam can hold the small amount of water shown physically available long enough to create a reservoir capable of recreational use; i.e., it can not be determined whether the proposed means of diversion construction and operation will be adequate to effect the proposed recreational use with the amount of water which has been shown to be available. Accordingly, even assuming all other criteria had been proved met, a strictly recreational use permit could not be granted. MCA §85-2-311(1)(c).

Proposal for Decision, p. 20.

The Applicant contends that the Proposal for Decision should be set aside for two reasons: 1) there is substantial credible evidence on the record to support a finding that water is available for appropriation; and 2) even if other studies were required to supply evidence on water availability, the permit should be granted on the condition that those studies are completed. Applicant's Exceptions pp. 3-4.

The Applicant argues that the record will support a finding that there is enough water available for appropriation.

Applicant's Exceptions, p. 4. The Applicant concurs with the Hearing Examiner's finding that there will be an average of 605 acre-feet of water available of which 327 acre-feet will be lost to evaporation. Id. at p. 4. However, the Applicant excepts to the finding that seepage losses may exceed 278 acre-feet per year and thus it argues that water is available for appropriation. Applicant asserts that testimony on the record from expert witnesses indicate that seepage would be "minimal". Id. at p. 2. (Testimony of Gene Pope.) Additionally, Applicant claimed that the Carroll Dam Project overlays the site of a previous reservoir. Applicant argues that because the previous reservoir "obviously held water", it can be reasonably inferred that the new Carroll Dam will likewise hold water. Id. at p. 3.

In reviewing the Proposal for Decision, the DNRC may "not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact are not based upon competent substantial evidence. . .". Section 2-4-621(3), MCA. The Hearing Examiner found that there was insufficient evidence on the record to support a finding that the construction and operation of the dam will be sufficient to impound and maintain the limited amount of water shown to be available because of concerns with seepage and evaporation losses. The Hearing Examiner ruled that the seepage and evaporation losses are critical to project viability because of the limited amount of water shown to be available. Proposal for Decision,

Conclusion of Law No. 8. The record supports the conclusion that seepage and evaporation are of vital concern in this matter.

Both the sufficiency of reports and the credibility of testimony in regard to seepage (and the inferences drawn therefrom) were challenged at hearing. It is the duty of the Hearing Examiner to weigh and balance evidence and testimony in making findings of fact. The Hearing Examiner found that there was not substantial credible evidence on the record to serve as a basis for ruling on the seepage problem. In this case, the Hearing Examiner found that there was not substantial credible evidence to provide a basis for ruling on seepage of the proposed dam. The Hearing Examiner specifically considered all issues raised by the Applicants in their exceptions. His Findings of Fact and Conclusions of Law are not clearly erroneous, nor are they arbitrary or capricious. They will not be overturned.

The Applicant also argues that if seepage is perceived to be a problem, then the permit should be issued with the condition that a seepage study be done. If no water is shown to be available after the study, the project will not be built. Oral Argument, March 8, 1989.

> To absolutely prove the exact amount of seepage loss will require intensive geotechnical exploration and analyses. This geotechnical work will entail a considerable expenditure by the Applicant. As is the case with final engineering design, this kind of work will be done prior to actual construction of the Project. A water use permit is but one step in the process. The Water Use Act does not contemplate that an Applicant do all of these things prior to obtaining a permit.

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Applicant's Exceptions, pp. 3-4.

At oral argument, the Applicant asserts that requiring a seepage study prior to obtaining a permit would be unreasonably burdensome and expensive to the Applicant.

In this case, given the limited amount of water available, the viability of the project depends on seepage and evaporation losses. Applicant asserts that we should condition the permit based on a seepage study being completed. However, by law, the Applicant must prove that the proposed means of diversion are reasonable and water will be beneficially used prior to a permit for appropriation being granted. Section 85-2-311(1), MCA. It is up to the Applicant to prove that the proposed means of diversion is adequate to beneficially use water that is available. The Hearing Examiner specifically ruled on this issue, and found that the Applicant had not met this burden. That decision is based on substantial credible evidence on the record and will not be overturned.

EXCEPTIONS TO OBJECTORS

Objectors filed exceptions to the Proposal for Decision asserting that the 605 acre-feet identified in the Proposal for Decision is more water than is available in the source of supply. Basically, they argue that that amount was based on incorrect and incomplete studies which were discredited at hearing. The Objectors also contend that the Proposal for Decision did not consider, quantify, or analyze senior water rights, other than

those of Fish and Wildlife Service, in finding the amount of water available. Objector's Exceptions, July 25, 1988.

Because the permit was denied, the DNRC will not consider these exceptions at this time. The Objectors are not precluded from raising these exceptions at a later date if necessary.

Dated this 30 day of June, 1989.

Laurence Siroky
Assistant Administrator
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 30th day of June, 1989, as follows:

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Irene V. LaBare
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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * * * * * * * *

IN THE MATTER OF THE APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 57448-S40R BY SHERIDAN COUNTY/ CITY OF PLENTYWOOD	))))	PROPOSAL FOR DECISION

* * * * * * * * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on Wednesday, September 24, 1986, in Plentywood, Montana. The record was left open at the end of the hearing for receipt of various documentation and testimony. See Preliminary Matters I, II and V, infra. The record closed on March 21, 1988.

Appearances

Applicants appeared by and through Ted Doney, attorney at law, Helena, Montana.

--Doug Smith, Chief Planner for Sheridan County, appeared as witness for Applicants.

--Charles Delvaney, Member of the City County Planning Board and Plentywood City Council, appeared as witness for Applicants.

--Gene Pope, engineer with Interstate Engineering, Jamestown, North Dakota, appeared as expert witness for Applicants.

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Objectors Clarence and Gary Wagnild, Orville Wold, Arlene Whitney and Bernice Van Curen (hereafter referred to individually, or collectively as "Objector Wagnild et al") appeared by and through Chris Mangen, Jr. and Janice Rehberg, attorneys at law, with the firm Crowley, Haughey, Hanson, Toole and Dietrich, Billings, Montana.

--Gary Wagnild, an Objector hereto, appeared as witness for above-said Objectors.

--Bernie Wold, a water user in the area of Plentywood dam and son of Objector Orville Wold, appeared as witness for the above-said Objectors.

--Gary Elwell, hydrologist with HKM Associates, Billings, Montana, appeared as expert witness for above-said Objectors.

Objector United States Department of Interior Fish and Wildlife Service (hereafter, "USFWS") and Objector Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation (hereafter, "Tribes") appeared by and through John Chaffin, attorney at law for the United States.

--Douglas Oellermann, agricultural engineer with the Bureau of Indian Affairs, appeared as witness for the Bureau of Indian Affairs.

Preliminary Matters

I. At the beginning of the hearing, it was moved that the hearing be bifurcated so as to allow further opportunity for settlement between Applicants and Objector USFWS. The motion, receiving no objections, was granted and the hearing bifurcated accordingly. On October 21, 1986, a stipulation was executed by

said parties, whereby Objector USFWS agreed to withdraw its objection hereto contingent upon the inclusion of certain agreed terms and conditions in the Permit. On January 27, 1987, the Hearing Examiner notified the parties that the stipulated terms and conditions would not be included in the Permit unless the department found them necessary for fulfillment of the Permit criteria. On September 3, 1987, said parties executed a Stipulation of Facts purporting to establish a factual basis for the inclusion of the stipulated conditions in the Permit. On September 15, 1987, Objector Wagnild et al filed an objection to Paragraph 6 of the Stipulation of Facts as containing a "fact" contrary to evidence presented at the hearing. No other objection was received.

Having received no objection to paragraphs 1, 2, 3, 4, 5 and 7 of said Stipulation of Facts, the Hearing Examiner hereby accepts and admits same into the record as uncontroverted evidence and may adopt all or portions thereof as Proposed Findings of Fact. The Hearing Examiner admits paragraph 6 as disputed evidence relevant to a determination of the availability of unappropriated water, which determination will be made based on the full record in this matter.

II. During the hearing, Applicant moved that the record be left open for receipt of testimony of Vivian Lighthizer, whom Applicant desired to call as a witness, but who for good cause was not available on the date of the hearing. The motion, receiving no objection, was granted and the record left open for said purpose. On January 15, 1987, the deposition of Vivian Lighthizer was taken with counsel for all parties present. On March 31, 1987, the certified transcript of said deposition was filed, together with two

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exhibits which had been stipulated into the record during the deposition. See infra, Objector Wagnild et al Exhibits D-1 and D-2. The transcript and exhibits are hereby deemed part of the record in the matter.

III. Applicant's motion, made at the hearing, to dismiss the Tribes' objection is denied. See Conclusion of Law 3, infra.

IV. Applicant's motion, made at the hearing, to dismiss portions of Objector Wagnild's objection is granted. See Conclusion of Law 4, infra.

V. At the end of the hearing, it was moved that the parties be allowed to file memoranda in summation after all post-hearing evidence had been submitted. (See Preliminary Matters I and II, supra.) The motion was granted, post-hearing evidence was timely submitted, and a schedule for filing of closing memoranda was issued. The record closed on March 21, 1988.

Exhibits

Applicants offered eight exhibits for inclusion in the record.

Applicants' Exhibit 1 (a copy of the July, 1983 "Sheridan County Comprehensive Plan" prepared by Doug Smith, Sheridan County Planning Board staff planner) was admitted without objection.

Applicants' Exhibit 2 (A copy of the April, 1986 "Sheridan County Recreation Study", prepared by Randall R. Thoreson, Planning Consultant, Bozeman, Montana) was admitted without objection.

Applicants' Exhibit 3 (a supplement promoting this project, placed in the local newspaper by "Friends of Carroll Dam") received objection that it was not probative of the issues. Applicant

alleged it was relevant to bona fide intent. Because the document was only shown to illustrate that some community members were in favor of the project, and because the interest of some individuals in the project does not necessarily reflect the actual intent of the body politic, admission was denied.

Applicants' Exhibit 4 (the March, 1986 "Preliminary Environmental Review on the Proposed Carroll Dam and Reservoir Project") was admitted without objection.

Applicants' Exhibit 5 (a preliminary engineering report entitled "Feasibility of Carroll Dam as a Municipal Water Supply, City of Plentywood" prepared by Webster, Foster and Weston, Consulting Engineers) was admitted without objection.

Applicants' Exhibit 6 (a copy of a 29-page document entitled "Feasibility Study for Carroll Dam, Sheridan County, Montana, January 1985" prepared by Interstate Engineering, Inc.) was admitted without objection.

Applicants' Exhibit 7 (a draft of a document entitled "Carroll Dam Runoff Yield Study, Sheridan County, Montana") was admitted without objection.

Applicants' Exhibit 8 (a copy of the North Dakota Dam Design Handbook, prepared by A. Richard Moum, P.E., Dale L. Frink, P.E., and Eugene J. Pope, P.E., published June, 1985, by North Dakota State Engineer) was introduced into the record by stipulation of Objector Wagnild et al and Applicant. The exhibit was admitted without objection.

At the hearing Wagnild et al offered two exhibits for the record.

Objector Wagnild et al Exhibit 1 (a 3' x 3' map of the area of the proposed point of diversion) was admitted without objection.

Objector Wagnild et al Exhibit 2 (the resume of Gary Elwell) was admitted without objection.

During the deposition of Vivian Lighthizer, two exhibits were introduced into the record by stipulation of Objector Wagnild et al and Applicant.

Objector Wagnild Exhibit D-1 (a copy of Application for Beneficial Water Use Permit No. 61843-g40R by the City of Plentywood) received no objection and is hereby admitted.

Objector Wagnild Exhibit D-2 (a copy of Permit to Appropriate Water No. 61843-g40R issued to the City of Plentywood on December 24, 1986) received no objection and is hereby admitted.

There was no objection to any of the contents of the department file.

Proposed Findings of Fact

1. MCA §85-2-301 provides that "a person may not appropriate water or commence construction of diversion, withdrawal or distribute waters therefor except by applying for and receiving a permit from the department".

2. This Application was regularly filed on March 12, 1985 at 10:31 a.m.

3. The pertinent facts of the Application were published in the Plentywood Herald, a newspaper of general circulation in the area of

the source, on October 23 and October 30, 1985. Timely objections were received from Bernice Van Curen and Arlene Whitney, Clarence V. Wagnild and Gary D. Wagnild, Orville Wold, United States Department of the Interior Fish and Wildlife Service (USFWS), and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservations (Tribes). A notice of this hearing was duly served on all parties July 14, 1986.

4. By this Application, Applicants seek to appropriate up to 3500 acre-feet per annum of water from Plentywood Creek, a tributary of the Big Muddy Creek, between January 1 and December 31, inclusive, of each year by means of an on-stream dam to be located in the NW¼SE¼NW¼ of Section 5, Township 35 North, Range 54 East, Sheridan County, Montana, and stored in a reservoir of 3500 acre-foot capacity, for use as follows: up to 700 acre-feet per annum for consumptive municipal use in Sections 16, 17, 18, 19 and 20 of Township 35 North, Range 55 East, Sheridan County, Montana; up to 2800 acre-feet for recreational use in Section 5 and 6 of Township 35 North, Range 54 East, and in Sections 31, 32 and 36 of Township 36 North, Range 54 East, all in Sheridan County, Montana.

5. Although the Application documents two beneficial uses of water and how much water will be put to each use, neither the Application nor the Application supplement documents when water will be put to beneficial use. The Application does document that construction of the dam will be completed about one year after a permit is received.

6. The Application (Section 4) contains the phrase "[i]f Plentywood water supply is developed . . ." and the supplement to the Application received June 10, 1988 (Section 2) contains the

statement "it is intended that a portion of the water supply (up to 700 acre-feet) could be used for a water supply for the City of Plentywood should they chose (sic) to develop a means of transmission and water treatment". The record contains no other evidence regarding the City of Plentywood's intent, at the time of filing, to appropriate.

7. During the summer of 1985, the Plentywood City Council decided the City would provide an outtake facility and pipeline if the dam were constructed. At the hearing it was estimated that a source of water, other than those presently used by the City of Plentywood for municipal purposes, would be needed and put to use in 10 to 12 years. (Testimony of Charles Delvaney.)

8. Applicant seeks authorization to impound up to 3500 acre-feet of water per year. During the period of initial fill, up to 3500 acre-feet per annum would be consumptively used (stored) for formation of the permanent pool behind the dam. Once the reservoir has reached permanent pool elevation, approximately 350 acre-feet per year would be consumptively used to replace water lost by evaporation, and 700 acre-feet per year would be consumptively used to replace water removed from the reservoir for municipal purposes.

9. There would be seepage from the reservoir which would maintain "water mounding" (saturation of soils surrounding the reservoir). Some of the seepage would ultimately return to Plentywood Creek below the dam. (Testimony of Gene Pope.) There is no evidence regarding the amount of seepage which would go to create and maintain the "mounding", nor is there evidence as to the percentage of such seepage which would return to the creek.

10. Objector USFWS claims certain water rights in Big Muddy

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Creek, to which Plentywood Creek is tributary, which rights supply Medicine Lake Natural Wildlife Refuge. USFWS objects hereto asserting there are insufficient unappropriated waters in the source to supply the proposed project.

11. By stipulation with USFWS, Applicant has agreed to limit the proposed period of appropriation as follows: Applicant will not impound water during the "spring runoff period", which has been defined for purposes of the Stipulation as that period which occurs between February 15 and June 15 of any given year beginning when the USFWS observes flowing water at the "Medicine Lake diversion" until the water flow at said "Medicine Lake diversion" drops to a rate of 30 cfs, except as allowed by the USFWS. (September 3, 1987 Stipulation of Facts [hereafter, "Stipulation"], p. 1, 2).

12. Although there is no data of record showing the rate or duration of diversion from Big Muddy Creek to supply Medicine Lake in the past, the record otherwise shows that the water needs of USFWS are fulfilled in most years during the "spring runoff period". (Stipulation, paragraph 5.) Objector USFWS has no other objection to issuance of the Permit and, providing that the Permit is conditioned to limit Applicants' period of diversion as set forth in the Stipulation (see Finding of Fact 6, supra), Objector USFWS withdraws its objection hereto.

13. Objector Tribes assert a right to certain of the waters passing through, bordering, or which are used on, the Fort Peck Reservation, which waters include the Big Muddy Creek. The Tribes object hereto asserting there are insufficient unappropriated waters in the source to supply the proposed project.

14. The Hearing Examiner takes administrative notice that the Tribes have entered into the Fort Peck-Montana Compact whereby the State of Montana and Tribes have stipulated that the tribes own a Tribal water right, which is held in trust by the United States for the benefit of the Tribes, priority date May 1, 1888, to divert no more than the lesser of 950,000 acre-feet per annum, or the quantity of surface water necessary to supply consumptive use of no more than 475,000 acre-feet per annum, of water from the Missouri River, and certain of its tributaries. MCA §85-20-301 Article III(A). The tributaries from which water may be diverted include any tributary that "flows through or adjacent to the reservation, except the mainstream of the Milk River". Article III(I). Pursuant to the Compact, the Tribes may at any time prior to April 10, 1990 establish a schedule of instream flows for said tributaries, instream flows to be considered part of the Tribes' consumptive use of surface water. Article III(L). The Tribes must provide the State with notice of each existing use of tribal water. Article V(B).

The State of Montana is to administer all rights to the use of surface water within or outside the Reservation which are not a part of the Tribal water right, to the fullest extent allowed by law. Article V(C). The Tribal water right is protected under the laws of Montana just as is any water right with a priority date of May 1, 1888, except that the Tribal water right is subordinate to certain specified uses with later priority dates as set forth in the Compact. Article IV(A). The Tribal water right would not be subordinate to any Permit issued hereunder.

15. The Tribes had not, as of the date of hearing in this

matter, determined what portion of the consumptive volume set forth as the Tribal water right in the Compact would be utilized to maintain minimum instream flow(s) in the Big Muddy Creek. Thus, the Tribes did not present evidence of annual volumes required to maintain instream flows, nor have the Tribes stated what flow rate(s) would constitute such minimum instream flow(s). The Tribes did not present any evidence regarding existing diversions of Big Muddy Creek water.

16. Objectors Van Curen and Whitney allege that their exempt instream livestock water right, priority date March 3, 1962 (referred to as Water Right 6), would be adversely affected, i.e., that the point of diversion would be inundated. The point of diversion is within the proposed permanent reservoir pool.

17. Objectors Clarence and Gary Wagnild object alleging adverse effect to Claimed Water Rights Nos. 167686, 167687, 167688, 167689 and 167690 (also referred to as Water Rights 1 through 5, respectively), as well as Claimed Water Right No. 186551, an exempt stock water right, and Permit No. 25041-S40R, due to inundation.

Water Right 3 is for stockwater out of Plentywood Creek at points upstream from the flood pool which could result from the requested appropriation. Water Rights 2 and 4 are for stock and domestic water, respectively, from wells located approximately one mile outside the edge of the flood pool. At the hearing Objector Wagnild admitted that Water Right 2, 3 and 4 would not be affected by the proposed appropriation. Objectors continue to allege, however, that the reservoir would create problems in running their ranch in that it would bisect the ranch.

Water Rights 1 and 5 are for stock water out of Plentywood Creek at points which would be inundated by the proposed permanent reservoir pool. The location of the other specified water rights are not of record, nor have Objectors Wagnild alleged adverse effects pertaining thereto.

18. Objector Orville Wold objects alleging adverse effect to Claimed Water Right No. 24408 (also referred to herein as Water Right 7), and Certificates of Water Right Nos. 13614-g40R and 59659-g40R (also referred to herein as Water Rights 8 and 9, respectively), and other property rights due to inundation.

Water Right 7 is for stock water from an unnamed coulee of Plentywood Creek. Its point of diversion is outside the projected flood pool. Water Right 8 is for domestic water from a well which is outside the flood pool. Water Right 9 is for stock water from a well which is near, but apparently outside, the projected flood pool.

19. Plentywood Creek drainage above the proposed dam site (hereafter, "upper Plentywood Creek") generates a minimum of 500 acre-feet per annum and a maximum of 4600 acre-feet per annum. The average annual volume generated is 2419 acre-feet. (Applicant's Exhibit 7.)

20. The proportion of the average annual volume which is generated in upper Plentywood Creek between February 15 and June 15 exclusive of the stipulated "spring runoff period" (defined in Finding of Fact 11 as that period which occurs between February 15 and June 15 beginning when the USFWS observes flowing water at the Medicine Lake diversion until the water flow at said diversion drops

to a rate of 30 cfs) can not be determined based on the record; however, the proportion of the average annual volume generated in Plentywood Creek outside the February 15 to June 15 period can be determined.

If the Stipulation entered into by Applicant and Objector USFWS is adopted, the amount of water physically available to Applicants at the proposed point of diversion will depend upon two variables, i.e., when water occurs in upper Plentywood Creek, and when USFWS requires water (the latter variable determining the length of the period of appropriation in a given year). As to when water occurs, the record shows that in the average year about 75 percent of the volume of water generated upstream from the USGS gage measuring the Big Muddy (said gage located in the SW¼SW¼NW¼ of Section 27, Township 34 North, Range 55 East, Sheridan County, Montana, approximately 7 miles south of the City of Plentywood and 30 miles downstream from the confluence of Plentywood Creek and Big Muddy Creek) passes the gage between February 15 and June 15. (Department file: USGS Water Discharge Records.) Because the record estimates of annual generation of Plentywood Creek (see Finding of Fact 19) are based on this gage and two other gages further downstream, it may be inferred, with a degree of certainty equal to that with which an estimate of the annual flows generated in upper Plentywood Creek was established, that, in the average year, 75 percent of the volume of water generated in upper Plentywood Creek occurs between February 15 and June 15; or, that on the average about 25 percent, or about 605 acre feet of water, is generated during the remainder of the year.

No valid estimate of how much water occurs between February 15 and June 15, excluding the "spring runoff period", can be made based on this record because Applicants did not present evidence of historical Medicine Lake diversion patterns. Such evidence may have revealed periods during which USFWS generally does not need water and these periods could have been correlated with estimated monthly generation data for Plentywood Creek to arrive at an estimate of the average amount of water which occurs outside the "spring runoff period", i.e., when USFWS is not diverting. However, without such information, the record as compiled will not support a valid estimate of average annual volume available during the February 15 to June 15 period. In sum, although the evidence of record is competent to show that in the average year 605 acre-feet of water occur in upper Plentywood Creek during the period June 15 to February 15, the evidence will not support any finding as to how much water occurs between February 15 and June 15 outside of the "spring runoff period".

21. As of the date of the hearing, Applicants had completed preliminary studies regarding feasibility of the dam. However, Applicants had not negotiated for or acquired the property proposed as the place of use herein, had not obtained the financing to construct the facility, had not put the funding issue to a vote of the general public, and had yet to make "certain financial decisions" prior to proceeding with the project.

22. Except for compacted Tribal water rights, the record shows no other planned uses or developments for which a permit has been issued or for which water has been reserved.

Proposed Conclusions of Law

1. The department has jurisdiction over the subject matter hereunder, and over the parties hereto. MCA Title 85, Chapter 2, Part 3 (1985).

2. The department gave proper notice of the hearing and all substantive and procedural requirements of law and rule appearing fulfilled, the matter is properly before the Hearing Examiner.

3. The Hearing Examiner hereby denies Applicant's motion to dismiss the Tribes' objection.

The Hearing Examiner, having taken administrative notice of the Fort Peck - Montana Compact, and having analyzed same, can find no evidence that the Compact imposes a moratorium on appropriations from any stream on, adjacent to, or near the reservation, either expressly or by implication. It is equally clear, however, that the Tribes have an existing water right to appropriate the amounts stated in the Compact with a priority date of May 1, 1888 (the Compact is thus not exactly analagous to the State water reservation system) and that the Tribal water right enjoys the same protection as other water rights in the State of Montana. (Finding of Fact 14.) Therefore, and as Plentywood Creek is a tributary of Big Muddy Creek, the Tribes as senior water right holder have the right to object hereto.

4. Applicant's motion to dismiss those portions of Objector Wagnild's objection alleging adverse effect to Water Rights Nos. 2, 3 and 4, is granted, and those portions of the objections based on allegations of adverse effect to those water rights are dismissed with prejudice.

At the hearing, Objector Wagnild admitted that Water Rights 2, 3 and 4 would not be affected by the proposed appropriation. Indeed, the allegation of adverse effect to these water rights is based solely on anticipated inconvenience to objectors in having to negotiate the reservoir to get from one source of water to another. (Finding of Fact 17.) The only issue raised is thus not one of adverse effect to water rights, but one of adverse effect to interests other than water rights.

The department does not have jurisdiction to consider adverse effect to property rights when making its determination whether to issue a permit. Although Objector Wagnild et al has correctly read the provisions of MCA §85-2-308 which allow for filing objections based on adverse effect to property, water rights, or interests of the objector, the legislature made the final pronouncement as to whether adverse effect to property interests other than water rights could be considered by the department in making its determination in 1983 when the criterion codified in MCA §85-2-311(1)(b) was amended. That year, the requirement that applicant prove "the rights of a prior appropriator will not be adversely affected" was replaced by the requirement that applicant prove "the water rights of a prior appropriator will not be adversely affected". See Section II, Chapter 448, L. 1983. Thus, under the maxim expressio unius est exclusio alterius, there is no criterion which can be construed to authorize permit denial if an applicant fails to prove that there would be no adverse effect to an objector's property interests outside his water rights. See also In the Matter of

Application for Change of Appropriation Water Right No. 138005 by Delbert Kunneman, Proposal for Decision at p. 13 (Final Order, April 23, 1984).

5. The department shall issue a permit if Applicant proves by credible evidence that the following criterion are met:

(a) there are unappropriated waters in the source of supply:
    (i) at times when the water can be put to the use proposed by the applicant;
    (ii) in the amount the applicant seeks to appropriate; and
    (iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;
(b) the water rights of a prior appropriator will not be adversely affected;
(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
(d) the proposed use of water is a beneficial use;
(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

6. Applicant has entered into a Stipulation whereby it has agreed to restrict its period of appropriation. (Finding of Fact 11.) The stipulated restriction resolves in the affirmative whether there will be some years when no calls will be placed on Applicant

by, or due to the assertion of the water rights of, Objector USFWS. (Finding of Fact 12.) As the stipulation thus effects partial satisfaction of the criterion codified as MCA §85-2-311(1)(a), see In the Matter of the Beneficial Water Use Permit No. 60662-S76G by Wayne and Kathleen Hadley, Proposal for Decision, pp 6-10, (Final Order, April 1988), the stipulated restriction is hereby accepted as relevant and necessary to fulfillment of permit criteria. Therefore, and as a reduction in the period of appropriation from that applied for will not prejudice any party hereto, the Application is hereby amended accordingly.

7. The effect of the stipulated restriction is to remove the "spring runoff period" (defined in Finding of Fact 11) from the proposed period of appropriation. The length of the "spring runoff period" may vary from year to year. It could be from one day to 4 months in length (February 15 to June 15) depending on how rapidly the desired lake level in Medicine Lake is reached; however, the fact remains that Applicants will not be able to appropriate any water during the "spring runoff period". Accordingly, Applicants inter alia must prove that sufficient water is physically available at the proposed point of diversion, at times outside the "spring runoff period", to supply the amounts requested.

The record will only support a finding that an average volume of 605 acre feet of water per annum is physically available during the stipulated period of appropriation (Finding of Fact 20), while an average volume of greater than 1050 acre-feet of water per annum is clearly necessary to supply the proposed uses. (Findings of Fact 8, 9.) Because the record thus does not show that sufficient water is

physically available at the proposed point of diversion to supply the proposed municipal and recreational consumptive needs, it must be concluded that Applicants have failed to prove the criterion codified as MCA §85-2-311(1)(a).

8. It should be noted that the Hearing Examiner has considered the proposed recreational appropriation apart from the proposed municipal appropriation. That is, he has considered whether the evidence supports a grant of the proposed recreational appropriation only. Unfortunately, the record will not support a conclusion that the means of diversion, etc. are adequate given the amount of water shown to be physically available.

Applicant initially requested authorization to appropriate up to 3500 acre-feet of water per annum. Were that amount found to be available as a yearly average, seepage and evaporation losses would probably not significantly impact the project. However, as this record will only support a conclusion that on the average there are 605 acre-feet of water per annum physically available during the stipulated period of appropriation, and as known evaporation losses alone would account for up to 54 percent of such average annual available volume at full pool elevation (Finding of Fact 8), and as an unknown amount of seepage will occur (Finding of Fact 9), the seepage and evaporation losses are important factors. For instance, if seepage and evaporation together were to exceed 605 acre-feet per annum by even a small amount, the permanent pool would either stabilize at a level where evaporation and seepage loss is small enough to be compensated by the annual recharge to the reservoir or, if the seepage loss were sufficiently great, the reservoir would

never fill. In other words, given the reduced volume of water shown physically available, seepage and evaporation losses are critical to project viability.

Because the record contains no evidence as to the amount of seepage loss, it can not be determined whether the bottom lands upstream from the proposed dam can hold the small amount of water shown physically available long enough to create a reservoir capable of recreational use; i.e., it can not be determined whether the proposed means of diversion construction and operation will be adequate to effect the proposed recreational use with the amount of water which has been shown to be available. Accordingly, even assuming all other criteria had been proved met, a strictly recreational use permit could not be granted. MCA §85-2-311(1)(c).

9. Although it is not necessary for purposes of rendering this decision to address the remaining criteria, because the issue of bona fide intent was cogently argued by counsel, the Hearing Examiner incorporates the attached Memorandum addressing said issue, and hereby adopts same as a Conclusion of Law pertaining to the issue of bona fide intent.

WHEREFORE, based on the foregoing proposed Findings of Fact and Conclusions of Law and the record and file in this matter, the Hearing Examiner propounds the following:

PROPOSED ORDER

That Application for Beneficial Water Use Permit No. 57448-s40R by Sheridan County/City of Plentywood be denied.

MEMORANDUM

While MCA §85-2-310(3) authorizes the department to return an application when the department finds it is not in good faith or does not show bona fide intent to appropriate water for a beneficial use, the statute does not require that an applicant affirmatively plead and prove that the application is in good faith, etc. Rather, so long as applicant has not neglected the mandates of MCA §85-2-310(4), the proper filing of the application shows prima facie that it is in good faith and shows bona fide intent.[1]

In the instant case, Objector Wagnild et al assert that the Application, at least as regards the requested municipal supply for the City of Plentywood, does not meet the requisites of MCA 85-2-310(4); specifically, that the City of Plentywood did not include in the Application a general project plan stating when and how much water will be put to beneficial use, nor did it provide information pertaining to marketing of the water. The second of these allegations is without merit, as the City of Plentywood is the entity applying for municipal water and is the only entity which would use the water appropriated. Apportionment of appropriated water among the citizens, and attendant cost allocation, does not transform a municipal appropriation into a water marketing venture.

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[1]Of course, prima facie evidence may be overcome by contradictory evidence and such contradictory evidence, although atypically supplied (presumably unintentionally) by an applicant, is generally introduced by another party to the proceeding. See MCA 26-1-401; Memorandum and Order, January 7, 1988.

The Application was not made for the purpose of marketing water, and thus no marketing information is required under MCA §85-2-310(4).

The first allegation, however, that the City of Plentywood has not provided a general project plan stating when and how much water will be put to beneficial use, is supported by a more compelling argument. The City stated in the Application how much water would be put to beneficial use (700 acre-feet per annum); however, it has nowhere in the Application or supplement thereto set forth when it would commence utilizing such waters.[2] (Finding of Fact 5.) Therefore, the Application is facially deficient. Further, when water will be municipally used is not implied in the Application. (Other specifications set forth in an application may imply that water will be used immediately upon completion of the diversion works, or as soon thereafter as is possible, and "when" may thus be tied to the date of completion of the appropriation works.) Indeed, statements made in the Application and supplement raise the question whether the City of Plentywood ever intends to put reservoir water to municipal use. (Finding of Fact 6.) Therefore, it can only be

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[2]The Hearing Examiner notes that the Application was filed prior to enactment of MCA §85-2-310(4) on April 8, 1985. However, because the statute was made retroactively applicable, amendment or supplementation of the Application to provide a general project plan was necessary. Applicant Sheridan County filed a supplement to the Application on June 8, 1985. City of Plentywood did not, however, join in that supplement or, at any time prior to the hearing, detail, either by amendment or supplement, when water would be put to use by the City. Rather, the only record evidence relating to when water would be put to municipal use was first introduced at the hearing. (Findings of Fact 5, 6.)

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concluded that Applicant City of Plentywood's Application does not document, either expressly or by implication, when water would be put to municipal use.

Failure to include in an application a general project plan stating when and how much water will be put to beneficial use compels a finding that the application is not in good faith and does not show bona fide intent; whereupon, the department may return the application, with concomitant loss of priority date, as its final decision in the matter.[3] MCA §85-2-310(3). Applicant City of Plentywood opposes return contending that the filing of the Application, coupled with testimony given at the hearing that water would be put to municipal use in about 10 or 12 years, is sufficient to show the existence of bona fide intent. Applicant's Post Hearing Reply Brief, p. 6. However, mere filing of the Application and a statement of a project plan given at the time of the hearing can at best establish the existence of bona fide intent as of the time of the hearing, and such a finding is not dispositive of the underlying issue.

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[3] It may be argued that the Application is "defective" under MCA §85-2-302, and that it should be returned under that statute, thereby allowing Applicant the chance to complete the Application and retain the original priority date. However, that the Application is not "defective" under said statute is evidenced by the fact that the Application was processed as is, though lacking certain details of a general project plan. If the Application had been "defective", the department processing unit was required by law to return it. Thus, absent evidence that the processing unit acted contrary to law, the Hearing Examiner declines to now find the Application defective and return it for completion under MCA §85-2-302.

The result of compliance with MCA §85-3-310(4) is documentation that an applicant has formed a general project plan by the time of filing, and such documentation provides evidence that an applicant had at the time of filing the application bona fide intent to appropriate water for a beneficial use. Thus, it is the nature of Applicants' intent at the time of filing which §85-2-310(4) places at issue.[4] Consequently, it is the opinion of the Hearing Examiner that, where the filed application does not contain all the data necessary to satisfy §85-2-310(4), the underlying purpose of §85-2-310(4) is fulfilled and the application is rehabilitated if, and only if, the Applicant can prove that it in fact had bona fide intent at the time of filing.

In this case, City of Plentywood's Application is not in compliance with MCA §85-2-310(4) because of omission of part of the project plan. Further, the Application and supplement contain affirmative evidence that at the time of filing City of Plentywood lacked bona fide intent to appropriate. (Finding of Fact 6.) The

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[4]Compare Toohey v. Campbell, 24 Mont. 13, 60. p. 396 (1900); Power v. Switzer, 21 Mont. 523, 55 Pac. 32 (1898).
The Water Use Act continues the historic requirement that an applicant must intend to appropriate for a beneficial use at the time of filing, presumably in order to prevent speculators from obtaining an early priority date simply to obtain leverage in potential future water projects. Although speculation could be prevented in other ways; e.g., the department has been granted the authority to limit the time in which a permittee may perfect his appropriation (MCA §85-2-312), the requirement that an actual plan be in existence at the time of application was evidently considered more effectual by the legislature.

burden is thus on the City of Plentywood to present evidence that on the date of filing it possessed bona fide intent to appropriate water for municipal use. The City has presented no such evidence. (Finding of Fact 6.) Therefore, it can only be concluded that City of Plentywood, at the time of the filing the Application, did not have bona fide intent to appropriate water for a beneficial use.[5]

Regarding Applicant Sheridan County, as the Application and supplement document that dam construction will be completed one year after the permit is granted (Finding of Fact 5), and as it is implicit that water can be recreationally used from the date enough water is impounded by the dam to facilitate recreation, the requirements of MCA §85-2-310(4) are met. Also, the Application form and supplement thereto contain no affirmative evidence that Applicant did not at the time of filing have the requisite bona fide intent to construct the proposed facility and put water to recreational use.

Evidence presented regarding the issue of lack of bona fide intent is not sufficient to overcome the prima facie effect of the proper filing of the Application. See Memorandum and Order, January

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[5]It should be noted that, as certain evidence presented at the hearing tends to show that since the time of filing Applicant City of Plentywood may have formed bona fide intent (Finding of Fact 7), it is arguable that City of Plentywood's portion of the Application should not be returned under MCA §85-2-310(3), but that a new priority date be assigned as of the date of formation of bona fide intent. Cf. MCA §85-2-302.

7, 1988. That is, the evidence adduced by Objector Wagnild et al regarding Applicant Sheridan County's failure to prosecute certain actions does not show lack of bona fide intent, and the ambiguous statement that the County had certain financial decisions to make prior to proceeding with the project is not sufficient to outweigh the prima facie effort of proper filing of the Application. (Finding of Fact 21.)

Intent is a subjective phenomenon, and accordingly, the actual nature of a subject's intent can only be ascertained by inference from the subject's behavior (statements, actions, failures to act, etc.). Thus, it is only when an applicant's behavior is clearly inconsistent with the existence of subjective bona fide intent that one may infer lack thereof.

Regarding the assertions of Objector Wagnild et al, Applicants' failure to put the issue of whether to fund the dam to a vote of the general public is not necessarily inconsistent with the existence of subjective bona fide intent. The requisite intent can be formed by the County Commissioners, who are duly elected representatives of the general public.[6] Neither is Applicants' failure to acquire, or negotiate for, a possessory interest in the land described herein as the place of use in advance of making application inconsistent with subjective bona fide intent, because Applicants can acquire the place of use at any time through the power of eminent domain. (If

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[6]Of course, were the Commissioners to put the project to a public vote, and the public rejected the project, this vote would be regarded as a failure of bona fide intent subsequent to the filing of the application. However, absent evidence of a negative vote (which would amount to a "change of mind" in the body politic), the intent of the legislative body controls.

an applicant did not have the power of eminent domain, the lack of any possessory interest in the place of use would tend to show lack of bona fide intent. See In the Matter of the Application for Beneficial Water Use Permit No. 56725-s76M by John Pinder, Order to Show Cause, [Final Order May 30, 1986]). Finally, Applicants' failure to have construction money in hand, or to have arranged for it, or to know exactly what the costs will be in advance of making application is not necessarily inconsistent with possession of bona fide intent. Money can be acquired before and during construction, and exact costs are seldom known until a project is completed.

Regarding the statement of Applicant's witness Doug Smith that the County had to make "certain financial decisions" prior to a final decision to proceed with the project, that statement can reasonably be interpreted as reflecting uncertainty as to how and where to obtain necessary funding, as opposed to doubt as to whether to obtain it. The statement is thus not necessarily inconsistent with possession of bona fide intent, and is therefore not in itself sufficient to sustain a conclusion that Applicant Sheridan County lacks bona fide intent.

In sum, the Hearing Examiner concludes that Sheridan County had at the time of filing, and continued to have as of the date of hearing, bona fide intent to appropriate water for recreational use.

NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed

order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to

discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 10 day of May, 1988.

Robert H. Scott, Hearing Examiner
Department of Natural Resources
and Conservation
1520 E. 6th Avenue
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(406) 444 - 6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PROPOSAL FOR DECISION was served by mail upon all parties of record at their address or addresses this 12th day of May, 1988, as follows:

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